No. 15933

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEWIS F. BLAGG,

Appellant,

vs.

IRVING I. BASS, Trustee in Bankruptcy of the Estate of Lewis F. Blagg, Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

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Jurisdictional Statement.

This is an appeal from an Order of the District Court for the Southern District of California, Central Division, following a petition to that Court to Review an Order of the Referee in Bankruptcy, affirming the Trustee's Report on Exempt Property and denying appellant's Petition for Review of said Referee's Order.

The Order of the said District Court also adopted the Findings of Fact and Conclusions of Law on which said order of the referee was founded.

The jurisdiction of the District Court is based on Section 2(a)(10) of the Bankruptcy Act (11 U. S. C. Sec. 11).

Jurisdiction of this Court is based on Section 24 of the Bankruptcy Act (11 U. S. C. Sec. 47).

Questions Presented.

The questions presented are:

1. Whether the District Court erred in sustaining and confirming the Order of the Referee; which held that the homestead recorded by appellant was null and void and of no force or effect, and that appellant had no right, title or interest in the premises covered by the homestead;

2. Whether the finding that appellant's minor daughter was not residing with appellant on the premises covered by the homestead is supported by and is not contrary to the evidence;

3. Whether the Conclusion of Law by the referee that appellant on December 19, 1956 was not the head of a family, is not contrary to law;

4. Whether the referee erred in refusing to allow appellant a homestead exemption as a single man, in the amount of $5,000.00.

Specifications of Error.

The errors relied on are:

1. That it was error to sustain and confirm the Order of the Referee holding the declaration of homestead filed by appellant to be null and void and of no force or effect;

2. That it was error to rule that appellant had no right, title or interest in the homestead covered by said declaration of homestead;

3. That it was error to find that appellant's minor daughter was not residing with appellant on the premises and that she was not under his care and maintenance;

4. That it was error to rule that appellant was not the head of a family on the date of the filing of the declaration of homestead;

5. That it was error to refuse to allow appellant a homestead exemption to the extent of $5,000.00, as a single man.

Statement of Facts.

On December 19, 1956 appellant filed a Petition in Bankruptcy. Listed among his assets was the equity in his home. [Tr. pp. 3-5.]

In Schedule 5-B of his petition, appellant claimed a homestead as the head of a family. The claim was set forth in the following language:

> "Homestead on home at 11042 West Hondo Parkway, Temple City; Petitioner's 11 year-old daughter resides with petitioner during the summer months school vacations and petitioner therefore believes he is entitled to the exemption provided by Sections 1260-1261 of the California Civil Code, to wit: $12,500.00."

On April 10, 1957, appellee, the trustee in bankruptcy, filed his Report of Exempt Property, in which he refused to set aside the home of appellant as a homestead. [Tr. p. 7.][1]

On April 22, 1957 appellant filed his objections to the Report of Trustee. [Tr. pp. 8-9.]

A hearing was held before the referee on the trustee's report and appellant's objections thereto.

Following the conclusion of the testimony the referee filed his Memorandum Opinion in *re* Objections to

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[1]Appellant also claimed as exempt various tools used in his business as well as office furniture. The trustee refused to exempt the said tools and office furniture. However, appellant has waived any contention concerning the tools or the office furniture.

Trustee's Report of Exempt Property [Tr. pp. 10-16]; Findings of Fact, Conclusions of Law in *re* Objections to Trustee's Report on Exempt Property [Tr. pp. 16-20]; and his Order on Objections to Trustee's Report on Exempt Property [Tr. pp. 20-21].

The basis for the order refusing to exempt appellant's residence as a homestead is found in Finding No. VII, which reads as follows:

> "From at least September, 1956, to and including May 8, 1957, the date of the hearing herein, Roberta Blagg, the minor daughter of the bankrupt herein, has not resided with her father, Lewis F. Blagg, upon the premises claimed as homeland as the head of a family located at 11042 West Hondo Parkway, Temple City, California, but, on the contrary, the care, custody and control of said minor child has by judicial decree been awarded to her mother and she has during all of such period resided with her maternal grandmother and the bankrupt has not supported or maintained said minor child during said period." [Tr. p. 19.]

As Conclusions of Law, the Referee held:

> "On December 19, 1956, the bankrupt was not head of a family and the homestead on the property located at 11042 West Hondo Parkway, Temple City, California, is null, void and of no force or effect."

(Conclusion III);

> "The homestead filed by the bankrupt on December 19, 1956, was null and void and of no effect as to this bankrupt estate or the trustee in bankruptcy thereof." [Tr. p. 20; Conclusion IV.]

The Order made by the referee, with respect to the homestead matter, reads as follows:

> "3. That certain homestead filed herein by the bankrupt on December 19, 1956 . . . is null, void and of no force or effect and the bankrupt has no right, title or interest therein or claim thereon by reason of the said destination (*sic*) of homestead or otherwise or at all and said real property and all of the infringements (*sic*) thereon constitutes an asset of the bankrupt estate herein." [Tr. pp. 21-22.]

On August 16, 1957 appellant filed his Petition for Review by the District Court of the Order of the Referee. [Tr. pp. 22-24.]

On September 6, 1957 the referee filed his Certificate of Review. [Tr. pp. 25-31.]

On January 14, 1958 the Honorable Harry C. Westover, Judge of the District Court made his Order Sustaining the Referee on Review. [Tr. pp. 31-32.]

Résumé of Evidence.

Appellant was the only witness who testified at the hearing.

He testified that he has lived on the premises in question for approximately 17 years; that he is not presently married and was divorced by his wife at Reno, Nevada in 1955 and that the divorce was obtained by Mrs. Blagg. [Tr. p. 37.]

Appellant was not physically present in the State of Nevada at the time the divorce matter came on for hearing. None of his children were physically present in that State at the time the divorce decree was rendered, particularly Roberta. As far as he knew Roberta had never

been in the State of Nevada in the year 1955. Roberta is 12 years of age. Appellant was not represented by counsel in the Nevada divorce proceedings. He has two other children besides Roberta; they are, Ann Blagg, now Ann Bowman, 18 years of age who has been married since September, 1956. The other child is Frances Louise Vincent, 23 years of age, who has been married since June 1955. [Tr. pp. 40-41.]

In 1956 and on December 19, 1956 Roberta's home was at the West Hondo Parkway property (the home of appellant). [Tr. p. 45.] She was not physically present on the premises on December 19, 1956. She was physically present on the premises between June and September 1956. After September her physical presence was at her grandmother's in Turlock, California. She was going to school there.

Appellant sent Roberta to Turlock for the reason that the school there was similar to the one here and he thought that she would get along better and get away for a while from the situation here (referring to the divorce proceedings). [Tr. p. 46.]

Mrs. Blagg was not, in December 1956, residing on the premises and had not been since approximately the Christmas of 1954. He and Mrs. Blagg separated at that time. He does not know where Mrs. Blagg was from December 1954 on.

He was not in direct communication with Mrs. Blagg and as a matter of fact Mrs. Blagg had just left the premises and had left home and the three children there. [Tr. p. 47.]

Some of Roberta's personal effects were at his home on December 19, 1956. Between February and June of

1956 Roberta was with her grandmother at Turlock, California. This was the first full school semester. She returned to appellant's home in June of 1956 where she remained until Labor Day when she returned to Turlock at the beginning of the Fall school-semester. She has not been down since and is still going to school in Turlock. Between February and June of 1956 he supported Roberta and sent whatever money her grandmother thought was sufficient. [Tr. pp. 50-51.]

During the school vacation period from June to September, 1956 she was physically living at appellant's home and he supported Roberta. He does not believe that she came down during any of the school vacations between February and June of 1956, but if she did it was only for a week end. After September 1956 to the date of the hearing Roberta did not come down from Turlock. He continued to support her and some of her clothes and personal effects were still in the house after September 1956 and were at the house in December 1956 at the time of the filing of the Declaration of Homestead.

At no time did he ever enter into any agreement, oral or otherwise, in which he consented that the custody and control of Roberta would be given to Mrs. Blagg; nor did he have any agreement of any kind with Mrs. Blagg relating to the custody of the children; that he has never seen or spoken to Mrs. Blagg since she left. [Tr. pp. 52-53.]

He learned of the contents of the Divorce Decree [App. Ex. "1"] within the month preceding this hearing. He did not know prior to the time that he was served with a copy of the Divorce Decree, that the Nevada Court had granted custody and control of Roberta to Mrs. Blagg or that the Court had also awarded Mrs. Blagg the sum

of $20.00 per week for Roberta's support. He has never paid Mrs. Blagg anything for Roberta's support. Mrs. Blagg has never had custody or control of Roberta since the former left in 1954. In the last three months Roberta has gone to see her mother on week ends, at Kerman where the mother lives. He knows that Roberta is not living with Mrs. Blagg. [Tr. pp. 53-55.]

From the time Mrs. Blagg left in December 1954, through June 1956, his two older daughters, Frances and Ann, lived with him, as well as Roberta, except that Roberta was away to school between February and June 1956. He provided the support for all three children during that time, including the time Roberta was in Turlock between February and June 1956. Roberta would go to Turlock or come back upon his say-so. He made the determination as to whether Roberta was to go or not to go. It was he who determined that Roberta should go to her grandmother's and attend school there.

From June 1956 until some time into the Christmas Season of 1956 he supported his daughter Ann though she was already married. He also supported Roberta from June 1956 through the entire year of 1956 and also during all of 1957 to the date of the hearing. [Tr. pp. 56-57.]

On cross-examination appellant testified that he did not know in advance that Mrs. Blagg was going to get a divorce, that he had no track of her and did not know where she was. He did not enter into a property arrangement with Mrs. Blagg until after the divorce proceeding. He conferred with Mr. Lane (an attorney) when he found out that she had filed a complaint. He believes he found out about the filing of the divorce action through a lawyer in Temple City who called him and told him that

she had started proceedings. He testified that he had not seen the divorce decree himself until three days before "this other proceeding here" referring to a 21-A examination by the Trustee. [Tr. pp. 57-59.]

Roberta went to Turlock in the Spring of 1955 shortly after the date of the Divorce Decree on May 12, 1955. Up to that time she had attended school in Temple City (the place of his residence). She returned during the school vacation of 1955, some time between June and September at which time she resided with appellant. She had her place where she slept and where she kept her clothes and effects at his home. She did not sleep anywhere else during that time for several months during the summer vacation, except for a couple of days. She was with him for all of 12 weeks during the school vacation period in 1955. [Tr. pp. 60-61.]

Clara Sims is Roberta's maternal grandmother. He made arrangements with Clara Sims for Roberta to live with her, shortly after the divorce in 1955. He has not been up to visit at Turlock since that time. [Tr. p. 61.]

He sent Roberta to Turlock by train but did not go with her; he sent a sum of money with her at that time but he does not remember how much. He did not make any arrangements with the grandmother to send a definite sum each month. He does not send a definite sum each month. He does send money. The amount is determined by the grandmother figuring out how much would cover her room and board and when the grandmother wanted extra money for clothes she would tell him. He paid for Roberta's school, her clothes, and a small amount for room and board. [Tr. p. 63.]

He cannot state an average of the amount he paid for room and board; the grandmother said that $35.00 to $40.00 a month was plenty and he sent approximately that sum. At times there was more as when she needed clothes. He would send the money up and the clothes would be purchased. The clothes were kept in Turlock except when Roberta came home, at which time she would bring her luggage and the clothes she had purchased. When she goes back to Turlock she takes the clothes that fit her. She keeps some of her clothes at Turlock. [Tr. p. 64.]

On redirect examination in reference to the circumstances surrounding the execution of the Declarations of Homestead [App. Ex. "8" and Trustee's Ex. "A"] in the first of which he described himself as a single man and in the second as the head of a family, appellant testified as follows:

> "Well, Mr. Jones just did not know I had children at the house or anything, and he set it up, and as soon as he found out about it the next day, he said 'we will have to change it immediately', that was not through any fault of his, because it was a rush, 'Are you married?' and I said 'no' and that is the way it went in, that I am not a married man". [Tr. pp. 71-72.]

ARGUMENT.

The Referee's Decision Holding That the Declaration of Homestead Is Null and Void Is Predicated Upon Three Propositions.

1. That "the Declaration does not state that the bankrupt and minor daughter are residing upon the premises at the time of making the declaration"; [Certificate of Review, Tr. p. 28.]

2. That the minor child was living with her maternal grandmother "who has supported and maintained her granddaughter Roberta while living with her" and that "the father has contributed very little if anything to the care and maintenance and support of his minor daughter since at least September 1956." [Certificate of Review, Tr. p. 29.]

3. That the custody of the said minor child had been awarded to the mother by a Nevada court. [Certificate of Review, Tr. p. 27; see also Find. VII, Tr. p. 19.]

The Statements Required in a Declaration of Homestead by the Head of a Family.

Section 1263 of the California Civil Code sets forth that the Declaration of Homestead by an unmarried person claiming the exemption of a head of a family must contain:

> 1. "A statement showing that the person making it is the head of a family, and if the claimant is married, the name of the spouse . . .
>
> 2. "A statement that the person making it is residing on the premises, and claims them as a homestead.

3. "A description of the premises.
4. "An estimate of their actual cash value.
5. "(Character of the property, etc.)"

Nowhere in any of the statutes of California pertaining to homesteads is there any requirement that the declaration state that any person *other than the declarant* is residing on the premises at the time of making the declaration. Nor is there any case law in California indicating that such a declaration must contain a statement to that effect.

Section 1261, California Civil Code, among the definitions of "head of a family" includes "every person who has residing on the premises with him or her, and under his or her care and maintenance, * * * his or her minor child * * *". That definition has been part of the Civil Code since its original enactment in 1872.

In 25 Cal. Jur. 2d 349, Section 45, in reciting the statements which are necessary to a valid declaration of homestead it is said:

> "[T]he present statute requires only that the claimant show residence. It does not require that he take his family with him to establish a residence on the property to be homesteaded, but only that the person making the Declaration be residing on the premises."

Citing

Turnbeaugh v. Santos (9th Cir.), 146 F. 2d 168;

Skinner v. Hall, 69 Cal. 195, 10 Pac. 406 (In which it was held that a declaration of homestead may be made on premises whereon the claimant has actually resided for only one day, though his family resided elsewhere at the time).

The *Turnbeaugh* case quotes with approval from the *Skinner* case. In the *Turnbeaugh* case there was an objection by a creditor to the allowance by the trustee of the homestead exemption claimed. At the hearing before the referee on the objection the latter held the homestead to be invalid. The District Court affirmed the order of the referee without opinion. This Court reversed the referee and the District Court.

The facts in that case were that the bankrupt had bought a parcel of land and had put up a one-story frame building which he used as a temporary residence, intending to use it later as a garage after he had constructed a six-room residence on the premises. He and his family lived in a rented house nearby. The bankrupt put into this one-story-temporary residence a bedroom set, library table, rugs, and oil heater and later a wood stove. Until a well was dug in December, drinking water was brought to the temporary structure from the rented house. On November 14, 1940, the family moved into the temporary structure, and the next day the bankrupt's wife filed a declaration of homestead.

In holding that the appellants' intent to make the property their home was sufficiently shown, the court quoted at length from the *Skinner* case including the portion that held: "that it was immaterial that the wife and child were living at another house as long as his residence was actual."

The opinion in the *Turnbeaugh* case contains the following at page 171:

> "None of the facts recited by appellee are inconsistent with this actual and intended residence in the house of the homesteaded lot. The young girls lived

with their adult brothers at the rented house which their parents had left, as did the wife and child in the *Skinner case.*"

The Evidence on the Matter of Support of the Minor Child.

It is respectfully submitted that the finding that the bankrupt had not supported or maintained the minor child during the period from September 1956 to May 8, 1957, is not supported by, and is, in fact, contrary to the evidence. It is also submitted that the Summary of Evidence set forth in the Referee's Certificate of Review, pertaining to the child's physical presence in the Summer of 1956 and pertaining to her support, is inaccurate in the following respects:

At Transcript page 29, it is stated that "Roberta apparently spent part of her 1956 summer vacation with her father at Temple City".

Appellant's testimony in this regard was as follows:

"Q. During the school vacation period from June to September of 1956 did you support Roberta then? A. Yes.

Q. (The Referee) From June to September where was she living physically? A. (The witness) Physically she was living here.

Q. (Mr. Gordon) At the Temple City address? At your home, in other words. A. Yes." [Tr. p. 52.]

"Q. By Mr. Gordon: Between February and June of 1956 where was Roberta? Where was she physically present from February to June of 1956? A. She was up with her grandmother.

Q. Was she at her grandmother's before February of 1956 or was that her first semester away from home? A. That was her first full semester.

Q. So, from February to June of 1956 she was in Turlock? A. Yes.

Q. Prior to February of 1956 where was she making her home? A. Well, part of the time down here, and then whenever it was we sent her up there—I forget the exact date.

Q. Did she return to your home in June of 1956? A. Yes.

Q. And she remained until when? A. Labor Day.

Q. Then where did she go? A. Back to Turlock." [Tr. pp. 50-51.]

In the Certificate of Review [Tr. p. 29], it is stated that after resuming school in Turlock in September 1956, Roberta has continued to live "with her said maternal grandmother who has supported and maintained her granddaughter, Roberta, while living with her", and "The father has contributed very little, if anything, to the care, maintenance or support of his minor daughter since at least September 1956."

Appellant's testimony on the matter of support (and the only evidence in the record) was as follows:

"Q. During the time she was in Turlock, specifically from February 1956 to June, did you support Roberta; pay for her clothes or food and the necessaries of a child? A. Yes; whatever her grandmother thought was sufficient.

Q. In other words, the grandmother would write you and ask you for money and you would send some up. Is that correct? A. Yes.

Q. During the school vacation period from June to September of 1956 did you support Roberta then? A. Yes.

Q. After she went back after Labor Day of 1956 did you continue to support Roberta? A. Yes, sir." [Tr. pp. 51-52.]

Q. In résumé let me put it this way, Mr. Blagg; from the time Mrs. Blagg left in December of 1954 through June of 1956, with the exception of the period from February 1956 to June 1956, both your eldest daughter Frances and your daughter Ann lived with you? A. Yes, sir.

Q. And Roberta, with the exception of that period from February to June 1956? A. Yes.

Q. And you provided the support for all three of them, did you not, during that period of time? A. Yes, sir.

Q. Including the time that Roberta was in Turlock between February and June of 1956? A. Yes.

Q. And you also supported Roberta from June of 1956 through the entire year of 1956. Is that correct? A. Yes, sir.

Q. And also for this much of 1957 that has already elapsed? A. Yes." [Tr. pp. 56-57.]

In cross-examination appellant testified:

"Q. Let's talk about the support. You told your attorney that you supported Roberta. How did you support her? Let's begin as soon as she went north to Turlock. Did you take her up north to Turlock or did she go by herself or did someone come and get her? A. I sent her up by train.

Q. You didn't go with her? A. No.

Q. Did you send a sum of money with her then? A. Yes.

Q. How much? A. I wouldn't remember.

Q. Did you make an arrangement with Clara Sims to send a definite sum of money each month? A. No, I didn't.

Q. Did you send a definite sum of money each month? A. No, sir.

Q. Did you send money at all? A. Yes, sir.

Q. How did you determine how much to send? A. Well, it is on a ranch, and Clara just figured it out, how much her board and room was, I guess; then when she wanted extra money for clothes she would tell me.

Q. Did you pay her board and room? A. Well, I mean, I paid for her school, her clothes and a small amount for her board and room. It wasn't anything like that $20 a week in there or anything.

Q. How much did you average paying on the support for board and room? A. I don't really know.

Q. Did you send a regular sum at all? A. At the time we were talking about Clara said $35 to $40 a month was plenty, because that is as much money as they could get in an institution, you know, a County institution or something.

Q. Did you send that sum? A. Approximately. As I say, there was more at times, because when she needed clothes, why, they would ask for some money.

Q. You would send the money up and the clothes would be purchased then. Is that correct? A. Yes." [Tr. pp. 63-64.]

The Custodial Award of the Minor Child by the Nevada Court.

It is undisputed that Roberta was at no time during the progress of the divorce action actually present in the State of Nevada; and that she was actually domiciled in and physically present in the State of California during all of that time.

This presents the question of whether the Nevada Court had the power to either award the custody of Roberta to Mrs. Blagg or had the power to enter a support order against Mr. Blagg. It is not claimed that Mr. Blagg was served with process in the State of Nevada. It is undisputed that he was served with such process in California, It is not claimed that Mr. Blagg made an appearance in the Nevada action.

The applicable rule is stated in 4 *A. L. R.* 2d at page 25 and is as follows:

> "The physical absence of the child from the state at the institution of the proceedings, together with the fact that the child is not domiciled within the state, has been held to negate jurisdiction in the court to make a valid award of custody."

Among the California citations listed in the Annotations are:

De La Montanya v. De La Montanya, 112 Cal. 101, 44 Pac. 345;

Boens v. Bennett, 20 Cal. App. 2d 477, 67 P. 2d 715;

In re Chandler, 36 Cal. App. 2d 583, 97 P. 2d 1048.

The Annotation at page 26 states the rule to be:

> "Even though the court has jurisdiction of the parents or persons with power to bring the nonresident child within the state, still the court has been held to lack power to make a custody award."

The Annotation further states, at page 27,

> "Particularly is power lacking to make a custodial award if the court does not have jurisdiction of the person legally entitled to custody or the person with power to produce the nonresident child who is physically without the state."

The California cases cited in support of this statement are *De La Montanya v. De La Montanya* and *Boens v. Bennett, supra.*

In the case of *Boens v. Bennett, supra* (20 Cal. App. 2d 477, 67 P. 2d 715), the facts were that the wife, the defendant in the divorce action, was a resident of New York when the divorce suit by the husband was filed in California, and that the minor son was also a resident of the State of New York, where he continued to reside during the divorce proceedings. The wife had been served by publication. At page 480, the Court said:

> "The trial court held that jurisdiction in the divorce action rested upon substituted service, accomplished by mailing and publication, as a result of which the court found that the California court in the divorce action was without jurisdiction to deal with the custody of the minor children. In this we think the trial court was correct. Where, as in the divorce case here involved, the defendant wife, residing without the territorial jurisdiction of the California courts, was served by publication, did not appear, it cannot properly be said that there was a defendant in court.

In this proceeding, the court had before it only the status of the plaintiff husband. The summons, when served by publication upon the wife, a nonresident, was not really a writ to bring the defendant wife into court, but merely a notice prescribed by statute in the interests of fairness, and to rebut the idea that the proceeding was secret. (2 Bishop on Marriage and Divorce, sec. 159.) It brought the *res* into court and not the defendant. The adjudication must be confined to that status. As Judge Cooley, in his Constitutional Limitations (7th ed., p. 584), says: 'The publication which is permitted by the statute is sufficient to justify a decree in these cases changing the status of the complaining party, and thereby terminating the marriage; and it might be sufficient also to empower the court to pass upon the question of the custody and control of the children of the marriage, *if they were then within its jurisdiction. But a decree on this subject would only be absolutely binding on the parties while the children remained within the jurisdictions;* if they acquire a domicile in another state or country, the judicial tribunals of that state or country would have authority to determine the question of their guardianship there.' (Italics added.)

"If the children are within the jurisdiction, and the defendant is personally served with summons, and perhaps if he is not, the court may award the custody of the children to one of the parents. (De La Montanya vs. De La Montanya, 112 Cal. 101, 116 [44 Pac. 345, 53 Am. St. Rep. 165, 32 L. R. A. 82].) Where the children are domiciled, as was the case in the divorce action under consideration here, outside the jurisdiction of the California courts, the remedy of the plaintiff husband must, generally speaking in such cases, be confined to a dissolution of the mar-

> riage, with the incident benefits springing therefrom, but he cannot legally obtain an order for the custody of the children domiciled without the state. (*De La Montanya v. De La Montanya, supra,* p. 117. See, also, Freeman on Judgments, secs. 584, 585; Brown on Jurisdiction, secs. 6, 8, 78, 79.)" (A hearing by the California Supreme Court was denied.)

To the same effect; *In re Chandler,* 36 Cal. App. 2d 583, 97 P. 2d 1048:

The Referee, in his Memorandum Opinion [Tr. pp. 10-16], cites as "closely analogous" to the instant matter, the case of *Master Lubricants v. Cook,* 159 F. 2d 679 (decided by this Court), in support of the proposition that where custody of a minor child has been awarded to the mother, the father as head of a family has no further obligation to the child and therefore there was no basis for maintaining the homestead.

The question involved in that case was whether there had been an abandonment of the homestead which theretofore had been filed. No question was involved of the power of the trial court to award the custody of a minor child not within the jurisdiction of that court. While the case does not specifically disclose that the divorce suit was filed in California where both parties and the child had their domicile and residence, it is obvious that that was in fact the situation. The case speaks of an "Interlocutory Decree" and "Final Decree" terms which are peculiar to California practice. The records of the Los Angeles County Clerk's office disclose that the divorce action was filed in Los Angeles County under the title of *Minnee M. Cook, Plaintiff vs. George Oscar Cook, Defendant,* Case No. D-221735. The records of this Court corroborate that fact.

The Validity of the Declaration of Homestead Treated as a Declaration of a Single Man.

The Referee ruled the declaration of homestead to be *wholly* null and void and refused to allow a homestead exemption to appellant in the lesser amount applicable to a single person.

Assuming, *arguendo,* that appellant is not entitled to a homestead exemption as the head of a family, appellant nevertheless contends that in any event he is entitled to the homestead exemption of $5,000.00 allowed to a single person. (Cal. Civ. Code, Sec. 1260(2).)

In setting forth his claim of exemption in Schedule B-5 in his Debtor's Petition, appellant stated the basis of his claim in the following manner:

> "Petitioner's 11 year old daughter resides with petitioner during the summer months school vacation and petitioner therefore believes he is entitled to the exemption provided by Sections 1260-1261 of the California Civil Code, to wit: $12,500.00."

Appellant submits that the California cases of *Feintech v. Weaver,* 50 Cal. App. 2d 181, 122 P. 2d 606, and *Johnson v. Brauner,* 131 Cal. App. 2d 713, 281 P. 2d 50, support his contention that petitioner is at least entitled to the $5,000.00 exemption extended to a single person.

The *Feintech* case was an action to quiet title in the plaintiff to certain property he had purchased at an execution sale as a judgment creditor. The defendant sought to quiet title in herself by reason of a homestead which she asserted defeated the execution sale. It was shown that when the defendant executed the declaration of homestead she used a printed blank designed for use by the head of a family. She was not in fact the head of a

family because she was not married but was living with an adult son upon the property which she attempted to homestead. It was stipulated that the declaration contained all of the recitals prescribed by the California Civil Code relative to persons "not the head of a family". The trial court upheld the validity of the homestead to the extent of the exemption allowed a single person. The plaintiff contended that the additional recital contained in the homestead declaration to the effect that the claimant was the head of a family, when in fact she was not, destroyed its effectiveness and made it no declaration of homestead at all.

The reviewing Court in rejecting this contention and upholding the trial court said at page 183:

> "In the recent case of Greenlee v. Greenlee, 7 Cal. (2d) 579 (61 Pac. (2d) 1157) at page 583, our Supreme Court states: 'The homestead laws have always been given a most liberal construction in order to advance their beneficial objects and to carry out the manifest purpose of the legislature.' This has always been the rule of construction laid down by our California courts. (*McKay v. Gesford,* 163 Cal. 243 (124 Pac. 1016, 41 L. R. A. (N. S.) 303); *Estate of Levy,* 141 Cal. 646 (75 Pac. 301, 99 Am. St. Rep. 92); *Keyes v. Cyrus,* 100 Cal. 322 (34 Pac. 722, 38 Am. St. Rep. 296); *Southwick v. Davis,* 78 Cal. 504, (21 Pac. 121); *Roth v. Insley,* 86 Cal. 134 (24 Pac. 853); *Simonson v. Burr,* 121 Cal. 582 (54 Pac. 87); 26 Cal. L. Rev. 241);
>
> "There are California cases in the which it would seem that the expressed rule of liberality has not always been followed, particularly in decisions involving homestead declarations, and in which a rather strict

compliance with the provisions of the code has been required. Most of these cases have held declarations invalid because of the *omission* of some one of the matters required by the code to be included in them. (*Jones v. Gunn,* 149 Cal. 687, (87 Pac. 577); *Ashley v. Olmstead* (1880), 54 Cal. 616; *Hansen v. Union Savings Bank,* 148 Cal. 157 (82 Pac. 768); *Reid v. Englehart-Davidson Mercantile Co.,* 126 Cal. 527 (58 Pac. 1063, 77 Am. St. Rep. 206).

"The authority closest in point to the facts we are now considering is *Roth v. Insley, supra.* In that case it was contended that the homestead was invalid because a son made a declaration of homestead as head of a family when his only claim to be such was that his mother resided on the property with him. The decision turned upon the main question as to whether the homestead continued after the death of the mother, but in concurring opinion Mr. Chief Justice Beatty stated: 'The declaration of homestead in this case did not show that the claimant was the head of a family. It merely stated that he was, at the date of the declaration, actually residing on the premises with his mother, and altogether fails to state that she was under his care and maintenance, a condition made essential by the statute . . . But it was a good declaration for any person other than the head of a family, and sufficient to secure a homestead right of exemption to the extent of one thousand dollars . . . Such being the case, the homestead could not be sold under execution upon a judgment other than one of those enumerated in section 1241 of the Civil Code, without taking the steps prescribed in section 1245 *et seq.*'

"In the case at bar disregarding the recital that the claimant was the head of a family, treating it as

surplusage, we have a declaration of homestead which contains every element required by the Civil Code, and which would be upheld without question in any court. To give this effect to the instrument secures to the defendant the right to a home, which the Constitution of our state (article XVII, section 1) enjoins the Legislature to protect.

"It is therefore concluded that the homestead declaration in this case should be given a liberal construction; that the recital in question is surplusage and unnecessary; and that there was a valid homestead upon the property in question which defeated the attempt of the judgment creditor to take title to an execution sale."

In the *Johnson* case *supra* (121 Cal. App. 2d 713) the declaration of homestead there involved disclosed a failure by the wife to add the statutory requirements "that she, therefore, makes the declaration for their joint benefit" as required by Section 1263 of the California Civil Code.

The trial court found that there had been a substantial compliance with the requirements of Section 1263(1), notwithstanding the fact that such declaration did not contain the precise words that the declaration was made for the joint benefit of husband and wife, and rejected the contention of the appellant to the effect that while homestead and homestead exemptions are remedial and generally must be liberally construed, yet it was equally true that homestead and homestead exemptions are creations of statute and failure to comply with any requirement essential to a valid declaration cannot be supplied by liberal construction.

The reviewing court upheld the trial court in this respect, saying on page 716:

> "There are two apparently conflicting lines of decisions in this state, applying as occasion demands the 'strict construction' or the 'substantial compliance' rule. But they are not irreconcilable. And the necessity and basis for harmonizing them were foreshadowed in *Southwick v. Davis,* 78 Cal. 504 (21 P. 121) . . . It was there held that a statement in the declaration that the property 'does not exceed in value the sum of five thousand dollars' was sufficient compliance with the requirement of 'an estimate of their actual cash value.' (Civ. Code, Sec. 1263, subd. 4.) At page 507 the court said: 'Of course, it was necessary for the legislature to provide some manner by which one desiring to claim a homestead should make a public declaration of the fact, and designate the particular premises intended to be so claimed. But surely statutory provisions to that end should not be subjected to the rule of strict construction. Statutes for the purpose of carrying out the constitutional command are remedial, and should be liberally, or at least fairly and reasonably, construed. The homestead right is not one to be industriously pinched, and circumscribed, and circumvented, and beaten back. If the *facts* of an honest homestead claim be present, a substantial compliance with statutory provisions about making the claim public should be deemed sufficient.' And at page 508: 'When these several acts have been substantially performed, and when the declaration contains the essence of the statutory requirements, the construction should be so liberal as to *advance* the object of the construction and the statute'.

"A review of the authorities discloses that 'when the declaration contains the essence of the statutory requirements' the courts have upheld a reasonably successful attempt to follow the prescribed form but that they have refused to dispense entirely with any of the essential matters set forth in sub-divisions 1 to 4 of section 1263. This view is reflected by the opinion in *Feintech v. Weaver,* 50 Cal. App. 2d 181, 183 (122 P. 2d 606), wherein the Court says:

"(At this point the Court quotes at length from the Feintech case, which is contained in the quotation above given from the Feintech case)."

This appellant made an honest and forthright disclosure of all of the facts upon which based his claim of a homestead exemption as the head of a family; namely, that Roberta resides with him at his home during the summer school vacations, and that he "therefore believes that he is entitled to the exemption provided by Sections 1260-1261 of the California Civil Code, to-wit, $12,500.00." Whether as a matter of law, that limited residence of the child did or did not entitle appellant to the $12,500.00 homestead exemption, the fact still remains that his declaration contained all of the essentials required to be set forth in a declaration by a single man which would entitle him to a $5,000.00 homestead exemption. Stated another way, appellant did not *omit* any of the essential allegations required to be set forth in a declaration by one entitled to a $5,000.00 exemption.

It seems to be a rather harsh penalty to be deprived of all homestead rights because of an erroneous belief (if such be the case) that the facts stated did not entitle the declarant as a matter of law to the larger exemption as the head of a family.

The referee did not make a finding to the effect that appellant was guilty of fraud or dishonesty, nor is there any such implication in either the Memorandum Opinion or Findings of Fact.

Respectfully submitted,

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APPENDIX.

EXHIBITS, BANKRUPT'S:

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